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No. 88-1806

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

LAND AIR DELIVERY, INC. - - - Petitioner

versus

NATIONAL LABOR RELATIONS BOARD - Respondent

PETITIONER'S REPLY ON APPLICATION FOR WRIT OF CERTIORARI

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ARGUMENT

I. FIRST ISSUE

1. In contending that review by this Court is "unwarranted" the respondent abandons the basis of the decisions below and offers a new theory, one not heretofore argued by respondent or relied upon by any tribunal in this matter. The respondent's new theory is that use of contractor replacements is tantamount to the "devastating effect" (Brief in Opp. 9) caused by granting superseniority to replacement employees. For this theory, respondent relies on *NLRB* v. *Erie Resistor Co.,* 373 U.S. 221 (1963), a section 8(a)(3) case not mentioned heretofore by the ALJ, the Board, the court below, or by any party in this matter.

Respondent's argument on Question 1 makes no reference to *Fibreboard Corp.* v. *NLRB,* 379 U.S. 203

(1964), or to Section 8(a)(5); yet those were the bases of the decisions below that (as characterized by the D.C. Circuit) *NLRB* v. *Mackay Radio & T. Co.*, 304 U.S. 333 (1938), does not "trump" *Fibreboard*, and that Section 8(a)(5) governs this case. The D.C. Circuit was express in stating that the Section 8(a)(5) violation was the foundation for the Section 8(a)(3) violation.[1] See Pet. App. 12 n. 8.

Erie Resistor is one of the direct descendants of *Mackay* and is a Section 8(a)(3) decision.[2] The holding in *Erie Resistor* concerned "superseniority" for strike replacements and crossovers, and offers no support for the decisions below.[3] Furthermore, this Court has recently rejected an effort to "expand *Erie Resistor*." *TWA* v. *Independent Fed. of Flight Attendants*,

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[1]Respondent displays manifold incongruity regarding the Section 8(a)(5) bargaining claim. First, despite abandoning reliance on Section 8(a)(5) to support the decisions below, respondent recites evidence relevant only to bargaining issues: correspondence exchanged from June 3 to August 22, 1985, after the strike ended. Brief in Opp. 3-4. Second, this evidence is not probative because it concerns events which occurred well after the dates on which the Section 8(a)(5) violation was expressly alleged to have taken place, i.e., February 1 to March 1, 1985. Pet. App. 3-4, 21-22, 26-27, 96-97. Petitioner was never accused of refusing to bargain after the strike ended.

[2]The Court in *Erie Resistor* noted that the Board had found a Section 8(a)(5) violation (375 U.S. at 226 n. 5) but addressed the case only as one of alleged discrimination under Section 8(a)(3).

[3]Although now relying on the Section 8(a)(3) holding in *Erie Resistor*, the respondent rephrased petitioner's Question 1 to read solely in terms of Section 8(a)(5) and bargaining, stating it as whether it was unlawful to use permanent contractor strike replacements "without notifying or bargaining with the union." Brief in Opp. I. But bargaining and Section 8(a)(5) were not in issue in *Erie Resistor*.

—— U.S. ——, 103 L.Ed. 2d 456, 467 (1989). *Erie Resistor* would have to be strained to apply here.[4]

By abandoning *Fibreboard* at this stage of the proceedings and relying for the first time on the previously unreferenced *Erie Resistor,* respondent is either: (1) conceding that *Fibreboard,* a non-strike Section 8(a)(5) case, is not applicable to this case, as petitioner has argued throughout; or (2) attempting to minimize the tensions between *Mackay* and *Fibreboard* in an effort to downplay the significance of the issue presented.

However, respondent's belated change of direction in relying on *Erie Resistor* highlights the confusion under which the National Labor Relations Board is laboring on this issue of the propriety of replacing strikers with contractors. Even the Board is uncertain as to why use of contractor replacements is not the equivalent of using employee replacements. Clarification of this important matter is called for.

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[4]Respondent challenges (Brief in Opp. 11 n. 12) petitioner's reliance on *NLRB v. Insurance Agents' International Union,* 361 U.S. 477 (1960), for the proposition that use of economic weapons in response to a strike is not a bargaining (Section 8(a)(5)) issue. Respondent argues that the Board did not address this case as an assessment of "good or bad faith in bargaining negotiations" (Section 8(a)(5)) but rather as an impermissible burdening of the right to strike (Section 8(a)(3)). To the contrary, the Board expressly addressed this case as governed by Section 8(a)(5) and bargaining:

> Thus, we agree with the judge [ALJ] that [Land Air's] permanent contracting out the work previously performed by bargaining unit employees without notifying or bargaining with the Union constituted an unfair labor practice, even though done in the course of a strike.

Pet. App. 23-24. The Board's analysis contravened *Insurance Agents.*

2. Respondent asserts as a matter beyond dispute that contracting "destroys" the bargaining unit. We have suggested this is not so. Pet. 14-15.

On June 26, 1989, this Court granted certiorari in *NLRB* v. *Curtin Matheson Scientific, Inc.*, —— U.S. ——, 57 U.S.L.W. 3835 (1989) to address whether there should be any presumption as to union support by employee replacements. If the answer is that replacements should be presumed not to support the union, then petitioner's use of contractor replacements will have had a less destructive effect on the bargaining unit because it did not inject non-supporters into the unit. Employee replacements can vote the unit out of existence by decertifying the union; contractor replacements cannot. The "presumption" that contracting destroys the unit is no more valid than the presumption of union support by employee replacements, which presumption the Board itself has rejected in *Buckley Broadcasting Corporation of California*, 284 NLRB No. 113 (1987). See Pet. 14-15.

3. The respondent argues that there is no inconsistency among the circuits because the decision in *Hawaii Meat Company* v. *NLRB*, 321 F. 2d 397 (1963) was "narrowly drawn" in a manner excluding application to this case. Respondent notes that the employer in *Hawaii Meat* notified the union in advance of its plan to contract out the struck work. But even the Board, as quoted in *Hawaii Meat*, stated there was no requirement to give prior notice of such contracting before a strike:

> The Board also said: "We are not holding that before the strike ensues, an employer must reveal

> his intention to replace strikers on an individual basis, nor do we imply that an employer must advise the union in advance of the strike of his plans to counteract the impact of the strike."

321 F. 2d at 398

Respondent also attempts to distinguish *Hawaii Meat* because the contracting there began simultaneously with the strike, whereas here the additional contractors were not used until some three months into the strike.[5] If, as we have contended and as the Ninth Circuit held in *Hawaii Meat,* use of contractor replacements is the equivalent of using employee replacements, then the timing of the utilization is without significance. The question we ask this Court to address is whether that equivalence exists.

II. SECOND ISSUE

Respondent does not deny that a finding of fraudulent concealment by petitioner was made without notice and an opportunity to litigate as required by Due Process. Rather, despite the fact that both the ALJ and the D.C. Circuit considered it necessary to refer to fraudulent concealment in their respective decisions (Pet. App. 13, 98), respondent states that that finding was not relied on and that there were alternative grounds to reject the Section 10(b) defense.

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[5]In fact, as respondent acknowledges (Brief in Opp. 2, 10), not only had petitioner been using contractor drivers at all times during the strike (and indeed since before 1975), but the strike itself was motivated in part by the dispute over the use of subcontractor drivers. Thus, there was no sudden unprecedented changeover to contractor drivers.

Contrary to respondent's assertion, petitioner has preserved its challenge to those alternative grounds in Question 3 (although not suggesting that the alternative grounds are alone sufficient to raise an issue warranting review by this Court). The Due Process question would be determinative if petitioner's challenge to the alternative grounds is sustained.

Respectfully submitted,

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